

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RODNEY BRUCE)	
Claimant)	
VS.)	
)	Docket No. 223,672
FRESH START BAKERIES, INC.)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from an Award entered by Administrative Law Judge Julie A. N. Sample on April 23, 1999. The Appeals Board heard oral argument October 13, 1999.

APPEARANCES

Michael A. Preston of Kansas City, Missouri, appeared on behalf of claimant. Gregory D. Worth of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for an 8 percent permanent partial disability to the left shoulder. On appeal, respondent asks for review of the following issues:

1. Did claimant's injury arise out of and in the course of his employment? Respondent contends the shoulder injury occurred while claimant was playing basketball and not while working for respondent.

2. Did claimant meet with personal injury through a series of accidents from September 1996 through January 3, 1997? The ALJ found the date of accident was January 3, 1997, the last date claimant worked for respondent. Respondent contends that if claimant was injured at work, the injury occurred no later than October 1996 when claimant was doing potato rolls. This issue is important for respondent's contention that claimant did not give timely notice or provide timely written claim.
3. Did claimant give timely notice? The ALJ found claimant gave notice not later than January 7, 1997, shortly after the January 3, 1997, date of accident, as evidenced by information on a short-term disability form claimant signed. The ALJ also concluded the form was completed in lieu of filing for workers compensation to avoid recording a lost-time injury, further indicating respondent knew the injury was work related.
4. Did claimant make a timely written claim? The Application for Hearing, the first written claim, was filed June 17, 1997. If the date of accident is January 3, 1997, this is less than the 200 days allowed under K.S.A. 44-520a. But respondent contends the date of accident should be in October 1996, more than 200 days before the Application for Hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be reversed. The Board concludes claimant did suffer an injury at work, but the Board also concludes claimant failed to give timely notice and the claim must be denied for that reason.

Findings of Fact

1. Claimant, who had worked for respondent approximately 14 years, contends he injured his shoulder performing his work activities as a "pan man." Much of his work was with 50-pound bags of various ingredients used to make hamburger buns. He would stack them on carts, move the loaded carts, and then empty the bags in the mixing tank. He pushed loaded carts, weighing as much as 1500 pounds, into the production area.
2. Claimant gave a history of injury to his shoulder which began with injury while playing basketball. He testified that sometime in the spring of 1996, he experienced pain in his left shoulder when his shot was blocked. He did not seek medical attention and he continued to perform his regular duties at work. Then, in September 1996, claimant had another episode while playing basketball. On this occasion, he felt pain on the left after throwing the basketball with his right arm.
3. Claimant also testified to hearing a pop in his shoulder while taking seeds off his cart.

4. Shortly after the September basketball episode, claimant went to his family physician, Dr. Larry Lux. He reported to Dr. Lux that he had injured his shoulder playing basketball. X-rays taken at that time were normal, and Dr. Lux prescribed pain medication. Because he had to take the pain medication at work, claimant reported the problem to his coworkers and to Mr. Robert Young, the general manager. But claimant continued to perform his regular duties until sometime in October 1996 when he began doing potato rolls. While producing potato rolls, claimant had to lift, carry up some steps, and dump 55-gallon barrels weighing 65 to 70 pounds.

5. After doing the work for potato rolls, claimant's pain became so severe he returned to Dr. Lux. Dr. Lux referred claimant to Dr. Theodore L. Sandow, Jr. Dr. Sandow first saw claimant December 19, 1996. Claimant gave him a history of injury playing basketball. On December 24, 1996, Dr. Sandow discussed with claimant the results of the MRI and asked claimant to come to his office to discuss surgery. When Dr. Sandow saw claimant on January 2, 1997, to discuss surgery, claimant mentioned that he had lifted barrels at work and this was aggravating his shoulder significantly. Dr. Sandow ordered an MRI sometime shortly before Christmas 1996. Based on the results of the MRI, Dr. Sandow recommended surgery for a torn rotator cuff.

6. Dr. Sandow testified on direct examination that it was unlikely claimant tore his rotator cuff playing basketball. He opined that it was possible claimant had a partial tear but he considered it unlikely the tear occurred while playing basketball unless claimant fell or perhaps threw the ball overhand. He thought it more likely that claimant would tear the rotator cuff lifting barrels. On cross examination, he acknowledged that the tear could occur while performing an overhead pass and having an arm struck.

Dr. Sandow also testified that if claimant suffered a partial tear playing basketball and then completed the tear while lifting at work he would assign one-third of the impairment to playing basketball and two-thirds to lifting at work.

7. Claimant left his work for respondent January 3, 1997. Claimant testified he continued to work until that date because he had run out of sick leave. Claimant was then off work until he returned to work for respondent in September 1997 at the same rate of pay.

8. On January 7, 1997, claimant signed a short-term disability application form. The form was filled out by someone else and signed by claimant. Section 13 of the form asks for a description of the accident or description of the nature of disability and its first symptoms. The handwritten description states "Shoulder pain . . . severe, when lifting. Terrible pain at night after working all day."

Section 14 asks if the accident or illness is work related and the answer "Yes" was apparently first checked and then crossed out. The answer "No" is checked. In Section 15, the form indicated claimant does not intend to file a workers compensation claim.

9. When asked if he injured his shoulder at work, claimant informed his supervisor, Mr. Jim Hewlett, that he had been playing basketball.

10. Claimant acknowledged that he did not tell his employer that he thought he had been injured at work and testified that the first time anyone with respondent would have been aware that he thought he had been injured at work was when he filed his claim in June 1997. Claimant gave Dr. Sandow a history of injury while playing basketball some three months earlier.

11. For essentially the same reasons given by the ALJ, the Board concludes claimant did suffer injury to his shoulder arising out of and in the course of his employment with respondent. The evidence suggests the incident in the spring of 1996 while playing basketball was relatively minor. The basketball incident in September 1996 appears to have caused some more significant problem to the shoulder but only after the heavier work did the problem become unbearable. Although Dr. Sandow does acknowledge that the basketball incidents could have been the cause, the Board construes Dr. Sandow's testimony in general to support the conclusion that at a minimum the work caused additional injury.

12. The Board concludes as matter of fact that the completion of the short-term disability form is not shown by the evidence to be in lieu of filing a workers compensation form. The claimant's testimony indicates claimant may have, probably later, assumed this to be the case but the evidence does not, in our view, indicate there were conversations to that effect, or that respondent knew claimant believed the injury was work related, at the time the short-term disability form was completed.

Conclusions of Law

1. Claimant sustained accidental injury arising out of and in the course of his employment.

2. K.S.A. 44-520 requires an employee to give notice within 10 days after the date of accident. The time limits may be extended to 75 days if claimant establishes there was just cause for failure to give notice within the 10 days. But 75 days is the absolute limit unless the respondent has actual knowledge of the injury.

3. Based on claimant's own admissions, the Board finds claimant did not give notice within the time limits established in K.S.A. 44-520. This is true regardless of whether the date of accident was January 3, 1997, as found by the ALJ, or was in October 1996 as was urged by respondent. The Board also concludes respondent did not have actual knowledge. The information provided in the short-term disability form indicates the work activities caused symptoms. But in context with the fact claimant had at least implied, in his conversations with respondent, that the injury occurred playing basketball, the information on the form does not by itself impart knowledge of a work-related injury. In fact,

the information can easily be understood as simply indicating why claimant would miss work and need the benefits provided under the policy or that claimant was having difficulty doing his work due to the injury.

Claimant testified no one with respondent would have reason to know that he was claiming the injury to be work related until June 1997, more than 75 days after the date of accident. The claim must, therefore, be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample on April 23, 1999, should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael A. Preston, Kansas City, MO
Gregory D. Worth, Lenexa, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director